No. 10-903

FEB 11 2011

In The
Supreme Court of the United States

DARRELL G. OBER,

Petitioner,

v.

COMMISSIONER JEFFREY B. MILLER, et al.,

Respondents.

On Petition For A *Writ Of Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

GAETAN J. ALFANO, ESQUIRE
DANIEL J. MCGRAVEY, ESQUIRE*
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
(215) 320-6200
djm@pietragallo.com

Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTIONS PRESENTED

1. Whether a law enforcement agency may narrowly limit its members' right to consult with privately retained counsel in order to prevent disclosure of the agency's confidential investigative information.

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's rigorous analysis does not conflict with a decision of this Court or a Court of Appeals and where the ruling does not implicate an important federal question that has not been settled by this Court.

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Third Circuit:

1. Darrell G. Ober, Petitioner and Appellant below.

2. Jeffrey B. Miller, Respondent and Appellee below.

3. Ralph Periandi, Respondent and Appellee below.

4. Leonard McDonald, Respondent and Appellee below.

5. John Brown, Respondent and Appellee below.

6. Charles Skurkis, Respondent and Appellee below.

7. Robert Mrgich, Respondent and Appellee below.

8. Coleman J. McDonough, Respondent and Appellee below.

9. Jack Lewis, Respondent and Appellee below.

10. Joanna Reynolds, Respondent and Appellee below.

11. Robert B. Titler, Respondent and Appellee below.

TABLE OF CONTENTS

Page

PENNSYLVANIA STATE POLICE FIELD REGULATION INVOLVED – FR 1-1.05 1

STATEMENT OF FACTS 2

A. Factual Background 2

B. Course of Proceedings Below 3

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING REVIEW 5

I. PETITIONER FAILED TO SATISFY HIS STRINGENT BURDEN TO JUSTIFY THIS COURT'S GRANTING OF HIS PETITION 5

II. THE DECISIONS BELOW CORRECTLY APPLIED THE LAW THAT THE STATE POLICE'S INTEREST IN MAINTAINING THE CONFIDENTIALITY OF ITS INVESTIGATIVE INFORMATION OUTWEIGHS THE PETITIONER'S INTEREST IN COMMUNICATING WITH HIS PRIVATELY RETAINED ATTORNEY 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Connick v. Myers, 461 U.S. 138 (1983) 6

Pickering v. Board of Education, 391 U.S. 563 (1968).....6

UNITED STATES COURTS OF APPEAL CASES

Campbell v. Towse, 99 F.3d 820 (7th Cir. 1996).....7

Green v. Philadelphia Housing Authority, 105 F.3d 882 (3d Cir. 1997).....7

Jacobs v. Schiffer, 204 F.3d 259 (D.C. Cir. 2000) 6

Lytle v. City of Haysville, Kan., 138 F.3d 857 (10th Cir. 1998) 7

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982).....9

Meenan v. Harrison, 264 F. Appx. 146 (3d Cir. 2008).....7, 9

Moore v. City of Wynnewood, 57 F.3d 924 (10th Cir. 1995).....8

O'Donnell v. Barry, 148 F.3d 1126 (D.C. Cir. 1998).....8

Oladeine v. City of Birmingham, 230 F.3d 1275 (11th Cir. 2000).....1

Perisco v. City of Jersey City, 67 Fed. Appx. 669 (3d Cir. 2003).....1

United States v. Thomas, 58 Fed. Appx. 915 (3d Cir. 2003).....9

TABLE OF AUTHORITIES – Continued

Page

RULES

S. Ct. R. 10 ..... 4, 5

PENNSYLVANIA STATE POLICE FIELD REGULATION INVOLVED – FR 1-1.05

1.05 DISSEMINATION OF INFORMATION

A. Members shall not disseminate, in any manner, any confidential information of the Department or its members, without proper authority. For the purpose of this regulation, confidential information shall be defined as information which:

1. The disclosure thereof could:

a. Endanger a member, or any other person.

b. Impede a just disposition of a case.

c. Aid a person to escape arrest.

d. Delay the apprehension of a criminal.

e. Permit the removal of stolen property or evidence by a suspect.

f. Compromise or negate the judicial process.

g. Violate a statute of the United States or this Commonwealth pertaining to the release of designated confidential information.

h. Make known the contents of an internal or criminal investigation record or report to an unauthorized person.

2. Would identify a person who is acting as a confidential informant; however, members may divulge such identity to other members when it is authorized by proper authority and necessary in the performance of police work.

STATEMENT OF FACTS

A. Factual Background

In July 2003, Petitioner Darrell Ober ("Petitioner"), a former Captain in the Pennsylvania State Police ("State Police"), prepared a memorandum ("Memorandum") in which he unilaterally concluded that his superiors Colonel Jeffrey Miller, Commissioner of the State Police, and Lieutenant Colonel Ralph Periandi, Deputy Commissioner of the State Police, purportedly had misused their authority to aid a state senator against a political rival. Petitioner retained private counsel, Don Bailey, Esquire ("Attorney Bailey"), to review the Memorandum. In reviewing the Memorandum with Attorney Bailey, Petitioner disclosed certain confidential investigative information, including the identities of undercover investigators, potential witnesses and suspects. A Philadelphia newspaper ultimately published this confidential investigative information.

State Police Field Regulation 1-1.05 ("FR 1-1.05"), in effect when Petitioner shared this confidential investigative information with Attorney Bailey, prohibits State Police members from disseminating

"any confidential information of the Department or its members, without proper authority." Confidential information was defined as "information which the disclosure thereof could: (a) endanger a member, or any other person . . . (b) impede a just disposition of a case . . . (f) compromise or negate the judicial process . . . (h) make known the contents of an internal or criminal investigation record or report to an unauthorized person." Importantly, FR 1-1.05 does not prohibit a State Police member from seeking the advice of counsel. It merely limits the scope of the communication to protect the confidentiality and integrity of State Police investigations.

After the State Police discovered that its confidential investigative information had been distributed to the media, the State Police attempted to identify the source of the leak. Although the State Police found insufficient evidence to conclude that Petitioner had leaked the information to the press, the State Police concluded that Petitioner violated FR 1-1.05 by disseminating confidential investigative information to Attorney Bailey without authorization. Subsequently, Petitioner was disciplined.

B. Course of Proceedings Below

Petitioner filed an Amended Complaint against members of the State Police on December 22, 2004. In his Amended Complaint, Petitioner sought a declaration that FR 1-1.05 violated his First Amendment right to seek legal counsel. On July 21, 2008, the

District Court granted summary judgment and concluded that Petitioner's interest in communicating with his privately retained attorney did not outweigh the State Police's interest in maintaining the confidentiality of a current investigation, as well as in protecting the safety of its officers and members of the community. On September 27, 2010, the United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment "substantially for the reasons set forth by the district court in its thoughtful Memoranda."

SUMMARY OF THE ARGUMENT

Petitioner fails to offer the required compelling reason to justify review of his Petition for a *Writ of Certiorari*. He cites no conflict among state or federal courts and does not identify an important question that should be settled by this Court. Instead, the Petitioner asks this Court essentially to overturn a substantial body of precedent recognizing that law enforcement agencies have wide latitude to regulate an employee's speech in areas impacting safety, discipline, morale and uniformity within the Force. This request does not support a Petition for a *Writ of Certiorari*. S. Ct. R. 10.

REASONS FOR DENYING REVIEW

I. PETITIONER FAILED TO SATISFY HIS STRINGENT BURDEN TO JUSTIFY THIS COURT'S GRANTING OF HIS PETITION

Petitioner's so-called "compelling" reason for granting review can be reduced to "the District Court got it wrong." In reality, Petitioner offers no reason for review and fails to identify an "important federal question that has not been, but should be, settled by this Court." S. Ct. R. 10(c). Indeed, he vaingloriously frames the question as "our entire nation [is] at risk" if a law enforcement officer is not permitted to seek the advice of his privately retained attorney. Petitioner, however, has mischaracterized the issue. *See* Petitioner's Petition for *Writ of Certiorari* ("Petition") at p. 7. Indeed, as both Courts below have concluded, the subject State Police Field Regulation does not prohibit members from seeking the advice of a privately retained attorney; it merely prohibits members from disclosing "any confidential information of the [State Police] or its members without proper authority."

Further, the Petitioner concedes that no conflict exists among or between the District Courts, Courts of Appeal and state courts of last resort regarding whether his claim is actionable.

II. THE DECISIONS BELOW CORRECTLY APPLIED THE LAW THAT THE STATE POLICE'S INTEREST IN MAINTAINING THE CONFIDENTIALITY OF ITS INVESTIGATIVE INFORMATION OUTWEIGHS THE PETITIONER'S INTEREST IN COMMUNICATING WITH HIS PRIVATELY RETAINED ATTORNEY

In order to determine whether Petitioner's right to consult with counsel is protected, the analysis turns on: (1) whether the speech was a matter of public concern; and (2) if so, whether the government's interest in efficiency or effectiveness outweighs the value of the speech. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). *See also Jacobs v. Schiffer*, 204 F.3d 259, 265-66 (D.C. Cir. 2000) ("[T]he First Amendment does not provide a federal employee seeking legal advice regarding a dispute with the employing agency with *carte blanche* authority to disclose any and all confidential government information to the employee's attorney, but rather that the scope of the First Amendment right is determined by balancing the employee's interests in communication with the government's interests in preventing communication.")

Petitioner argues that his interest in consulting with his attorney (and, in doing so, divulging confidential information) outweighs the State Police's interest in maintaining the confidentiality of its

investigations. This argument lacks any support in the law.

The State Police have a significant interest in maintaining the integrity of their investigations, as well as the safety of their officers and witnesses. FR 1-1.05 is designed to accomplish those ends as it prohibits the dissemination of confidential department information to anyone without proper authority. These interests are well recognized and zealously protected by the lower courts. *See, e.g., Meenan v. Harrison*, 264 F. Appx. 146, 151 (3d Cir. 2008) (stating that "courts have given law enforcement agencies wide latitude to regulate an employee's speech when that speech impacts areas such as discipline, morale, and uniformity within the force"); *Perisco v. City of Jersey City*, 67 Fed. Appx. 669, 674 (3d Cir. 2003) (noting the interest of police department in maintaining rules and regulations); *Oladeine v. City of Birmingham*, 230 F.3d 1275, 1293-94 (11th Cir. 2000) (noting need for order, loyalty, morale and harmony in law enforcement agencies); *Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 867 (10th Cir. 1998) (recognizing the importance of confidentiality to the performance of police officers' duties); *Green v. Philadelphia Housing Authority*, 105 F.3d 882, 888-89 (3d Cir. 1997) (recognizing police department's interest in successfully fighting crime, protecting its officers and members of the community, and protecting its reputation), *cert. denied*, 522 U.S. 816 (1997); *Campbell v. Towse*, 99 F.3d 820, 829-30 (7th Cir. 1996) (recognizing the

need for loyalty in police departments), *cert. denied*, 520 U.S. 1120 (1997); *Moore v. City of Wynnewood*, 57 F.3d 924, 934-35 (10th Cir. 1995) (law enforcement has interest in maintaining discipline and harmony); *O'Donnell v. Barry*, 148 F.3d 1126, 1135-36 (D.C. Cir. 1998) (recognizing that police force requires a special degree of trust and discipline).

Here, the State Police have a well recognized interest in maintaining order within the department, as well as maintaining the confidentiality and integrity of investigations. FR 1-1.05 accomplishes those ends by prohibiting the dissemination of confidential information without authorization. Petitioner's Memorandum (which he shared with his private attorney) identified undercover investigators, potential witnesses and suspects. This obviously sensitive information could have jeopardized officers and compromised ongoing investigations. Accordingly, the State Police's interest in maintaining the confidentiality of such information was substantial. On the other hand, Petitioner's interest in giving this sensitive information to his attorney is far less substantial. As the district court recognized, Petitioner could have sought Attorney Bailey's counsel without exposing any confidential investigative materials of the State Police.

Further, FR 1-1.05 is not a blanket ban on the disclosure of confidential information. Indeed, the Regulation states that such information may be disclosed with permission from a proper authority.

See FR 1-1.05(a). Petitioner failed to seek authority from anyone to release this information. As such, his interest in communicating with his privately retained attorney is greatly outweighed by the State Police's well-recognized interest in maintaining the confidentiality of information regarding a current investigation. *See, e.g., Meenan*, 264 Fed. Appx. at 157 (interest in encouraging cooperating witnesses); *United States v. Thomas*, 58 Fed. Appx. 915, 918-19 (3d Cir. 2003) (recognizing law enforcement's interest in protecting identities of informants).[1]

CONCLUSION

In summary, Petitioner provides no compelling reason to justify review of the lower courts' decisions. For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for a

[1] Petitioner's reliance on *Martin v Lauer*, 686 F2d 24, 30-35 (D.C. Cir. 1982), is misplaced, as that case implicated a non-law enforcement agency's blanket prohibition on all communications with outside counsel concerning a reduction in force program.

Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

GAETAN J. ALFANO, ESQUIRE
DANIEL J. MCGRAVEY, ESQUIRE*
PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP
I.D. Nos. 32971 and 83176
1818 Market Street, Suite 3402
Philadelphia, PA 19103

Attorneys for Respondents

**Counsel of Record*

Date: February 11, 2011